Filed 7/6/12 In re P.S. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re P.S., et al., Persons Coming Under the Juvenile Court Law.	H037768 (Santa Clara County Super. Ct. Nos. JD-018467; JD-018468)
SANTA CLARA COUNTY DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES, Plaintiff and Respondent, v. O.S., Defendant and Appellant.	

Appellant O.S. is the father of two daughters, P.S. and P.S.2, who have special needs because of various disabilities. The juvenile court found in essence that he was unable to care for them following their mother's abandonment of them, subsequent incarceration and entry into deportation proceedings. We will affirm the order.

FACTS AND PROCEDURAL BACKGROUND[1]

The parents were born in Sierra Leone and separately immigrated to the United States in 2002. They met in San Jose. P.S. and P.S.2 are their twin daughters. When they were born, the mother was living in New York and appellant in San Jose.

On September 11, 2007, San Jose Police placed P.S. and P.S.2, who were then 18 months old, into protective custody after placing the then 19-year-old mother in detention under Welfare and Institutions Code section 5150.[2] The police could not locate appellant, the then 25-year-old father. The mother tested positive for methamphetamine and marijuana. The parents were not married to each other.

On September 13, 2007, the Santa Clara County Department of Family and Children's Services (Department) filed petitions pursuant to section 300, subdivision (b) (failure to protect) on behalf of P.S. and P.S.2. The petitions alleged that the mother had psychological and drug abuse problems and that appellant presented domestic violence and alcohol abuse concerns. The juvenile court detained the girls on September 13, 2007, putting them in emergency foster care.

The mother ascribed her problems to the difficulties involved in raising the girls by herself. Appellant did not help her with caregiving or financial support. She was also depressed about the death, in 1999, of her mother. She believed her father's sisters had arranged her mother's death by having a voodoo spell cast over her.

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[1] Most of the following facts are found in the record of a related case, *O.S. v. Superior Court* (H036903), an unsuccessful writ action brought by appellant. We took judicial notice of the record in that case on our own motion on December 27, 2011.

[2] Further unlabeled statutory references are to the Welfare and Institutions Code.

Appellant had a record of alcohol-related arrests and allegations of petty crimes on public transit. Initially he told the social worker that he wanted to quit drinking, but later he denied having alcohol or domestic violence problems.

The Department recommended not placing the girls with appellant. It troubled the Department that he suspected the mother's drug use but did not intervene to protect the children. On the one hand he would state that the mother was unfit to rear children, and on the other he would suggest that she be allowed to take the girls to New York. He acknowledged having virtually no idea how to rear children. He also acknowledged that he would not be able to care for the children without significant help from the paternal grandmother and an aunt. The grandmother, however, had had her own child and some grandchildren removed from her home by child welfare authorities following allegations of physical abuse. In addition, the mother stated that the grandmother had kicked her in the stomach when she was five months pregnant and had tried to poison her.

The children were placed in a foster home. P.S. had faciocranial abnormalities that required evaluation. The parents were visiting the children with a few exceptions.

After contested jurisdiction proceedings on November 20, 2007, the juvenile court sustained the section 300 petitions after striking the allegations describing appellant.

Appellant then started participating in some case plan services, but not parenting classes, for which he claimed to have insufficient time. He visited the children successfully. He drug tested, but only when he wished to. He claimed that he was attending some Alcoholics Anonymous meetings and he had a mentoring sponsor; but the sponsor's account of their interactions was not entirely consistent with appellant's.

The mother was not engaged in services and had stopped visiting the children. Once she offered no reason, another time she explained that she had been assaulted, and a third time she reported a miscarriage.

The juvenile court conducted a disposition hearing on January 14, 2008. It ruled that placing the girls in appellant's care would present a risk of harm. It ordered reunification services for the parents.

After the disposition hearing, appellant refused to engage in a case plan because he felt that the girls' situation was the mother's fault. The mother's whereabouts became unknown.

Appellant changed his mind and announced his willingness to start his case plan after meeting with a social worker on February 27, 2008. A report for the six-month review hearing scheduled for May 6, 2008, related that appellant had made some progress on his case plan. He was visiting the children regularly but seemed baffled by the drug-testing requirements even though he wished to abide by them.

At the 12-month review hearing, held on November 5, 2008, the juvenile court adopted the Department's recommendations to return the girls to appellant with family maintenance services. Appellant found it difficult to cope with the time demands presented by the different service providers and resulting appointments, but wanted the girls back with him. He planned to have his girlfriend care for the children while he worked, and a paternal aunt who lived in the home would help. The paternal grandmother moved out of the home, which the Department was insisting on before it would let the girls return to appellant.

The girls had been diagnosed with developmental delays and were receiving public services accordingly. P.S. was being assessed for craniofacial surgery. The mother was located; she was in the county jail.

The juvenile court set an interim review hearing for November 19, 2008. A report for it related that the children had been returned to appellant and a social worker visited him weekly. The social worker had requested that a public agency provide round-trip transportation for the services the girls needed. Even so, the children missed many

appointments because appellant was "too tired from work," "overslept," and "could not dress the children on time," and the "girlfriend was not willing to help."

As of December 17, 2008, appellant's girlfriend had moved out of the house and the paternal aunt planned to do the same, leaving him without the support he had stated he needed. Shortly after, appellant lost both his job and his residence. A social worker proposed a family shelter but appellant did not believe it would be good for the girls. Instead, on January 1, 2009, he requested that the girls be taken into protective custody. A team decision meeting resulted in a plan to place the children with the maternal grandparents in New York. Appellant planned to move to New York once the children were placed there.

The Department filed section 387 (i.e., supplemental) petitions on behalf of the children and the juvenile court detained them on January 6, 2009. They were again placed in foster care.

On March 6, 2009, the juvenile court set a section 366.26 hearing (i.e., a hearing to formulate a permanent plan for the children).

The Department prepared a report for the section 366.26 hearing, which was scheduled for June 22, 2009. The mother remained in jail. The foster mother for the girls' half-sibling, S.S., who was the third child of the mother in this case, requested placement of the girls with her and was willing to become their legal guardian. They had speech impairments and cognitive difficulties but were making progress, and the Department opined that adoption was a suitable outcome for them. It tentatively recommended that adoption be the permanent plan and that the section 366.26 hearing be continued to find an adoptive home.

In the face of this, appellant filed a section 388 petition (i.e., a petition to modify a prior juvenile court order) on July 1, 2009, requesting that the girls be placed with him. He stated that he had stable housing with his sister, was working, was attending a drunk-driving class, and had almost completed an associate of arts degree.

The juvenile court scheduled a hearing for July 30, 2009. The Department filed opposition. It reported that appellant still lived with his girlfriend and only planned to move in with his sister. He had obtained temporary employment at a department store, but if the job ended it would be unlikely that he could pay the rent his sister would require. He had just started attending school and was juggling classes, work, spending time with his other children, and visiting P.S. and P.S.2. Appellant was looking for someone to support him financially. He had not been able to cope with the girls when they were returned to him before and the Department opined that it was not in their best interest to be placed with him.

On September 21, 2009, the Department placed the girls in the same concurrent home as their half-sibling S.S.

The Department wrote a report for the interim review hearing scheduled for October 15, 2009. Appellant had cancelled every visit with the children for more than six weeks. He would cancel after the children had been brought to the visit site, upsetting them. The mother remained in jail.

Two months later, in an addendum report written for a hearing scheduled for December 15, 2009, the Department reported that appellant had visited the girls inconsistently, for a total of 10 times in six months. Initially this would cause the girls anxiety, but they adapted and came to view appellant as someone who visited from time to time, not as a caregiver, let alone their father. Appellant did not understand the girls' disabilities and resisted the idea of mental health services for them. The Department recommended that parental rights be terminated and that the girls continue with the plan of adoption by their foster parents.[3]

[3] The record sometimes refers to a single foster parent and at other times to foster parents. It appears that legal guardianship was, however, vested in a couple.

The sections 366.26, 387, and 388 proceedings were held concurrently on December 15, 2009. During them, the parties stipulated to suspend the contested hearing and decided that appellant would submit on the section 387 disposition to expand placement to foster care and withdraw his section 388 petition requesting placement of the children, and the parties would enter into a guardianship plan with the girls' caretaker. The juvenile court ordered weekly unsupervised visits for appellant.

According to a status review report for a section 366.3 (children's situation following a permanent plan) hearing scheduled for June 9, 2010, on December 23, 2009, the mother left jail and entered a residential substance abuse program—but not for long, because she assaulted another individual and was jailed for violating probation. She was again pregnant. She stated that she would visit appellant for food and lodging and that he had suggested they become a couple again so the girls could be returned to them. Appellant stated that he did not know the mother's precise circumstances but would give her food when she visited.

The guardians maintained their commitment to the children, who were "really happy" living with them. The children continued to receive public services to address their needs, including occurrences of aggressive behavior.

A day before the section 366.3 hearing scheduled for June 9, 2010, the Department submitted an addendum report. When a social worker called appellant's cell phone number on June 1, 2010, the mother answered. She had been released from jail on May 20, 2010. The social worker could hear appellant in the background. When the social worker asked him about this, he lied about it; also, he suggested that the children might have lied about being alone with the mother on one occasion. This bothered the social worker, who wrote that appellant "made decisions to send [the] children with their mother unsupervised. It could have been a very dangerous situation." A social worker watched appellant during a visit on June 7, 2010, and observed poor parenting skills. He did not interact with the girls, who watched television or spent time with extended family

members in another apartment. They threw food and objects and appellant ended the visit early.

Shortly afterward, appellant left California, and on August 18, 2010, the juvenile court adopted a recommendation that as long as he was gone he could make supervised phone calls to the extent that doing so was workable.

On December 30, 2010, the girls' counsel filed a section 388 petition requesting that a new section 366.26 hearing be set to terminate parental rights. Counsel alleged: "The children's father . . . moved to the East Coast in June of 2010. He has not had an in-person visit with the children since then and phone contact has been sporadic and inconsistent." The juvenile court scheduled a hearing for February 16, 2011.

The Department wrote a status review report for that hearing. Appellant was now living in Maryland. He would phone the girls; the report described his calling pattern as "[i]nitially . . . not very consistent."[4] The federal authorities were assessing the logistics of deporting the mother to Sierra Leone but had not decided when to do so. She had given birth to her fourth child, another half-brother to the girls. This child, J.S., was, as had been her three other children, taken from her by the child welfare authorities, and the

[4] In their briefing, the parties present markedly different characterizations of appellant's telephonic interactions with his daughters. According to appellant, who addresses this subject at length, the girls would want to speak with him but their maternal guardian would make it as difficult as possible, dissuading them from speaking with him, cutting him off, making the initial contact difficult, and the like. According to the Department, the children's age and intellectual impairments made the phone calls a challenge, but the guardian encouraged the children to talk with appellant. In a February 16, 2011, status review report, a social worker stated flatly: "The legal guardian never failed to call the father . . . nor ever failed to take [the] children to visit their mother." In addition, the Department points to evidence that appellant had to be ordered several times not to introduce his fiancée on the phone and not to ask potentially problem-inducing questions.

Department eventually placed him with the guardians. The girls, as before, were "really happy" living with the guardians.

When the social worker spoke to the mother, the mother was upset that appellant had moved out of state because before, when he was in California, he had let her see the children when they had unsupervised visits with him. Appellant "wanted a relationship with her," she stated. The Department recommended that a new section 366.26 hearing be set.

The Department submitted additional reports for the February 16, 2011, hearing addressing the girls' section 388 petitions and appellant's circumstances. On or about July 2, 2010, appellant went to Maryland to help an aunt, who, following in her husband's footsteps, would later be deported to Sierra Leone. He was taking care of the aunt's house and personal effects. He had hoped to return within a week. While on the east coast, appellant encountered one Nichole J., whom he had known since 2007. They fell in love and agreed to marry, and appellant moved into the home of Nichole J.'s mother.

Between July 2, 2010 and August 6, 2010, appellant's phone number changed twice and sometimes either appellant did not answer the phone or Nichole J. answered it.

The week that appellant hoped would suffice to resolve his aunt's logistical issues turned into months and he remained in Maryland. In February of 2011, appellant and Nichole J. came to California and met with a social worker. He said he was unemployed but would look for work. He asserted that he and Nichole J. together could rear the girls.

Appellant and Nichole J. visited with the girls on their fifth birthday, February 8, 2011. This was appellant's first visit with them since June of 2010. He told them that he would have a party for them at a family restaurant on February 11, 2011, with family members. The girls were brought to the restaurant that day, but appellant was not there. A social worker tried to call him, but his phone had been disconnected. He

later e-mailed and called to say that he had forgotten the time. The social worker rearranged the party for February 15, 2011, and it occurred.

On March 29, 2011, appellant filed a section 388 petition requesting that the girls be placed with him permanently or, failing that, temporarily along with maintenance services. He stated that he was living with Nichole J. and her mother and was working.

The juvenile court set May 9, 2011, for a hearing to consider the parties' various applications.

The Department filed a response in opposition to appellant's section 388 petition. It asserted in essence that appellant had the same unrealistic plans now as he had in 2008, when he failed to fulfill his obligations despite being given enormous logistical support from the Department, resulting in little or no benefit to the girls. It did not appear that he had a plan for dealing with the girls' disabilities, nor that he was taking steps to avoid relapsing into the abuse of alcohol or illegal drugs. Appellant's "life situation is almost identical to [what it was] . . . in late 2008," the social worker summarized in the Department's opposition papers. "Placing the children with the father is risking the stability that they now experience," she concluded.

On May 9, 2011, the juvenile court denied appellant's section 388 petition and scheduled a section 366.26 hearing for August 31, 2011.

The Department filed a report for the section 366.26 hearing in which it recommended adoption. P.S. and P.S.2 had been in the care of the guardians for almost two years, along with their two half-siblings. They continued to have developmental delays, qualifying them for social services. The P.S.'s faciocranial problem was non–life-threatening but needed to be watched; surgery was a possible eventuality. The guardians continued to pursue education and health services for the girls. The girls had a strong bond with their guardians, loved them and were loved by them, and saw them as their primary caregivers. The guardians also planned to adopt the girls' two half-siblings.

Appellant visited the girls at the San Jose Children's Discovery Museum on July 20, 2011. The visit was fraught with difficulties caused by appellant: he could not pay for everything and asked the social worker to subsidize him, and he initially failed to feed the girls' half-brother S.S. (the social worker ended up buying lunch for S.S.) and another son who was the product of a different union. That son "asked the father for food and [appellant] simply smiled." Finally he fed that son at his expense, but less generously than the girls despite the son's request to be treated equally, so the social worker asked everyone to share. The mother could not go on this trip. She was in federal prison awaiting deportation proceedings.

Appellant asked the social worker for an additional visit the next day, before his flight to the east coast was scheduled to leave. The social worker made arrangements and asked appellant not to tell the girls about the impending visit so as not to disappoint them. He told them anyway and then failed to appear for the visit.

The section 366.26 hearing produced the following testimony:

The main social worker had been assigned to P.S. and P.S.2 since January 24, 2008. She had little criticism of appellant personally but doubted he could be a parent to his daughters, as opposed to a "friendly visitor." P.S. and P.S.2 were specifically and, she thought, generally adoptable despite their intellectual deficits. The guardians occupied a parental role. Adoption by the guardians was in the girls' best interests—it would provide permanency and stability. If the relationship between appellant and the girls were severed it would not be detrimental to them; certainly they would not suffer great harm.

On appellant's behalf, other witnesses—appellant himself, two social workers, and Nichole J.—testified either explicitly or in essence that appellant occupied a parental role in relation to the girls. On rebuttal, the main social worker testified, accurately as to quantity, that the two other social workers had "observed the interaction with the father

and children only one time for one hour . . . . And I have been on this case from January of '08."

The juvenile court then announced its decision. It found by clear and convincing evidence that the girls were specifically and generally adoptable and were likely to be adopted. Regarding the statutory exception to the termination of parental rights that is the subject of this appeal, it found that appellant had not maintained regular visitation and contact with the girls. Regarding appellant's claim that others created barriers to his visits (notably, of course, telephone conversations that he perceived to be interrupted, prematurely ended, otherwise improperly curtailed, or thwarted altogether by the girls' maternal guardian—see *ante*, page 8, fn. 4), the court believed the Department's version of events and found that his telephone visits had not been interfered with.

The juvenile court found the relationship between appellant and the girls to be positive but fall short of a parent-child one and that the benefit of maintaining it was less in the girls' best interests than adoption would be. Under a preponderance of the evidence standard, terminating appellant's parental rights would not "greatly harm" the girls. The court terminated appellant's parental rights and freed the girls for adoption. It is from the order implementing that decision that O.S. appeals.

DISCUSSION

With regard to dispositions in juvenile dependency cases, the best interest of the child controls. (*In re Fernando M*. (2006) 138 Cal.App.4th 529, 534.) Adoption is the preferred alternative. (§ 366.26, subd. (b), (b)(1), (b)(2), (b)(5).) " 'The permanent plan preferred by the Legislature is adoption. [Citation.]' [Citation.] ' "The Legislature has decreed . . . that guardianship is not in the best interests of children who cannot be returned to their parents. These children can be afforded the best possible opportunity to get on with the task of growing up by placing them in the most permanent plan and secure alternative that can be afforded them." ' " (*In re Josue G*. (2003) 106 Cal.App.4th 725, 732.)

As noted, appellant claims that the juvenile court erred by not finding applicable the parent-child beneficial relationship exception to the adoption preference set forth in subdivision (c)(1)(B)(i) of section 366.26. That provision permits a juvenile court to choose an option other than adoption when the parent has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (*Ibid.*)

We recently held that review of a court's determination of the applicability of the parental or sibling relationship exceptions under section 366.26 is governed by a hybrid substantial evidence/abuse of discretion standard. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.) As we explained, "Since the proponent of the exception bears the burden of producing evidence of the existence of a beneficial parental or sibling relationship, which is a factual issue, the substantial evidence standard of review is the appropriate one to apply to this component of the juvenile court's determination. Thus, . . . a challenge to a juvenile court's finding that there is no beneficial relationship amounts to a contention that the 'undisputed facts lead to only one conclusion.' [Citation.] Unless the undisputed facts established the existence of a beneficial parental or sibling relationship, a substantial evidence challenge to this component of the juvenile court's determination cannot succeed. [¶] The same is not true as to the other component of . . . both the parental relationship exception and the sibling relationship exception[, which] is the requirement that the juvenile court find that the existence of that relationship constitutes a '*compelling reason* for determining that termination would be detrimental.' (§ 366.26, subd. (c)(1)(B), italics added.) A juvenile court finding that the relationship is a 'compelling reason' for finding detriment to the child is *based* on the facts but is not primarily a factual issue. It is, instead, a 'quintessentially' discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption. [Citation.]

Because this component of the juvenile court's decision is discretionary, the abuse of discretion standard of review applies." (*Ibid.*)

The juvenile court correctly ruled that appellant does not qualify for this exception. Substantial evidence supports its findings that he failed to visit the girls when present in California and failed to maintain adequate telephone contact with them when on the east coast. Not every time, to be sure—he sometimes visited and phoned them. But his record of paying attention to them was, if marginally better than spotty, not what a capable parent ordinarily would show.

In addition, other substantial evidence supports the juvenile court's decision that the beneficial relationship exception should not be exercised in her case.

"If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) But to qualify for that exception he had to do "more than demonstrate 'frequent and loving contact' [citation], an emotional bond with the child, or that [he] and [his] child find their visits pleasant. [Citation.] Rather, [he] must show that [he] occup[ies] 'a parental role' in the child's life." (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108.) The parent-child relationship must "promote[ ] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H., supra,* at p. 575.)

Appellant cannot meet this standard. He does not come close to meeting it. When he appeared interested at all in exercising the role of the girls' father, he fell well short of providing the care they needed, even with a high degree of logistical support from the Department's staff and others. We have spent considerable time reviewing the record, as no doubt the juvenile court also did. The record shows an individual with a variety of interests that would attract his attention from time to time and then be eclipsed by others.

The girls were one of those interests, but appellant's wavering and inconsistent attention to them was itself child-like at times and hazardous at others—risks evinced by appellant's desire to receive child-rearing help from the girls' paternal grandmother, who had a record of physical child abuse, and his making possible visits by their mother, from whom the girls had been removed for good reason, without supervision by Department staff. As the juvenile court observed during a hearing on May 9, 2011, appellant "makes promises that he can't keep. That hurts the children . . . . The thing that the children need the most in their lives right now is stability, and the love and care. And the guardians are providing . . . more than that." It has been said in the juvenile dependency context that "childhood is brief; it does not wait while a parent rehabilitates himself or herself. The nurturing required must be given by someone, at the time the child needs it, not when the parent is ready to give it." (*In re Debra M.* (1987) 189 Cal.App.3d 1032, 1038.) This is certainly true here: the girls need their parents' full attention and full awareness of their mental and physical challenges.

We do not doubt that appellant feels a tie to his children and loves them. He desires to be around them in the right circumstances. But that is not enough. The girls are in the status they are in—removed from their parents for good reason, placed with a welcoming and caring foster family that wishes to adopt them, and found to be adoptable—because of the mother's and appellant's numerous parental lapses, which required the Department to rescue them more than once. The conclusion stated in *Debra M.* applies fully here: appellant "has shown little evidence that [he] currently can provide anything for [the girls] except many promises and occasional visits. Expressions of love and concern do not equate to the day to day care and devotion the average parent expends on behalf of children." (*In re Debra M.*, *supra*, 189 Cal.App.3d at p. 1038.)

Turning to the other prong of the standard of review, the juvenile court did not abuse its discretion (*In re Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315) in finding that appellant had not shown a "compelling reason" (§ 366.26, subd. (c)(1)(B)) to qualify for

the exception. He did not demonstrate that the girls would be "greatly harmed" (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575) by ending her parental rights, and the positive nature of some of their contacts was insufficient by itself. (*In re Andrea R., supra,* 75 Cal.App.4th at p. 1108.) The juvenile court found that the girls were generally and specifically adoptable and there is no dispute that their guardians were prepared to adopt them. They had reared them for an extended period already, and done so satisfactorily.

Substantial evidence supports the juvenile court's finding, in essence, that the relationship did not "promote[ ] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575.)

CONCLUSION

The order is affirmed.

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Duffy, J.*

WE CONCUR:

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Rushing, P. J.

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Premo, J.

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.